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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 129

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SYBIL WHITEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 129

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SYBIL WHITEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[Caption omitted]

Before U. S. Board of Tax Appeals

Docket 13220

SYBIL WHITEHOUSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For the taxpayer: F. R. Coudert, Esq., Thos. Kelly, Esq., Blount Ralls, Esq., R. W. Candler, Esq., S. D. Bowers, Esq.
For the commissioner: T. P. Dudley, Esq., A. H. Murray, Esq.

Docket entries

1926
April 8—Petition received & filed.
" 12—Copy of petition served on solicitor.
" 12—Notification of receipt mailed taxpayer.
June 7—Answer filed by solicitor.
July 20—Copy of answer served on taxpayer. General calendar.
2 Nov. 15—Stipulation for hearing with 6243 & 10644 filed.
" 24—Stipulation that depositions of R. W. Candler & Rowland E. Cocks, filed in #6243, be used in above appeal filed.
Dec. 1—Hearing had before Mr. Milliken on merits. Briefs due 1-15-27.
" 30—Transcript of hearing 12-1-26 filed.
1927
Jan. 5—Motion for extension to 2-15-27 to file brief filed by taxpayer. See 6243.
" 11—Ordered, date for filing briefs be extended to 2-15-27 signed & filed. Both sides notified.
" 15—Motion for extension to 2-15-27 to file brief filed by G. C.
" 20—Granted. Both sides notified. See 6243.
Feb. 12—Brief filed by taxpayer.
" 15—Motion for extension to 3-17-27 to file brief filed by G. C.
" 17—Granted. Both sides notified.
Mar. 16—Motion for extension to 4-16-27 to file brief filed by G. C.
" 18—Granted. Both sides notified.
April 14—Motion for extension to 6-1-27 to file brief filed by G. C.
" 15—Granted. Both sides notified.
June 1—Brief filed by G. C. See 6243.

Docket entries—Continued

1927

July 8—Findings of fact & opinion rendered. Judgment will be entered on 15 days' notice, §50. Both sides notified.

Aug. 22—Notice of settlement filed by G. C.

" 24—Notice allowing taxpayer until 10-3-27 to file alternative settlement for hearing 10-20-27. Failure to do so, hearing set 10-12-27.

Oct. 12—Hearing had before Mr. Littleton on settlement.

3 Assigned to Mr. Milliken for order of redetermination.

" 13—Order & Decision redetermining deficiency signed & filed. Both sides notified.

1928

April 7—Petition for review by U. S. Cir. Ct. of Appeals, 1st Circuit, with assignments of error, filed by G. C.

" 13—Proof of service filed. Spotswood D. Bowers.

" 16—Proof of service filed. Sybil Whitehouse.

June 1—Motion for extension to 7-8-28 for preparation of evidence & transmission & delivery of documents filed by G. C.

" 6—Order granting extension to 7-8-28 for preparation of evidence & delivery of records to 1st Circuit entered.

" 26—Præcipe filed by G. C.

" 26—Statement of evidence lodged by G. C.

" 26—Motion for extension to 7-28-28 for preparation of evidence & settlement of record filed by G. C.

" 29—Hearing date changed to 7-11-28 for approval of statement of evidence.

" 29—Order enlarging time to 7-28-28 for preparation of evidence & transmission & delivery of record papers sur petition entered.

July 2—Proof of service of præcipe & statement of evidence for hearing 7-10-18 on settlement of record filed by G. C.

" 7—Order enlarging time to 8-8-28 entered.

" 11—Hearing had before Mr. Green. Continued to 8-8-28 for approval of statement of evidence.

" 11—Order placing on calendar of 8-8-28 for hearing on approval of statement of evidence entered.

July 24—Order enlarging time to 8-22-28 for preparation of

4 evidence & transmission of records sur petition entered.

Aug. 8—Hearing had before Mr. Sternhagen on statement of evidence. Continued to 8-2-28; 10 days additional to submit record.

" 8—Order motion to continue to 8-22-28 for hearing on approval of statement of evidence granted, entered.

" 13—Order enlarging time to 9-1-28 for filing certified copies of record papers sur petition for review entered.

" 22—Motion to enlarge time to 9-22-28 filed by G. C.

" 22—Order enlarging time to 9-22-28 entered.

Docket entries—Continued

928

t. 21—Statement of evidence approved & ordered filed.
21—Order enlarging time to 10–8–28 for filing certified copies of record papers sur petition for review entered.

Now, October 4, 1928, the foregoing docket entries certified from record as a true copy.

SEAL.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Petition

Filed April 8, 1926

The above-named taxpayer hereby petitions for a redetermination the deficiency tax imposed by the Commissioner of Internal venue set forth in his deficiency letter dated February 10, 1926 mbols IT:PA–1–60D, PBM–104) and as the basis of her petition s forth the following:

1. The taxpayer is a resident of the city of Newport, State of Rhode and, and her principal place of business is at Stone Villa, Newport, R. I.

2. That the said deficiency letter was mailed to the taxpayer on the 10th day of February, 1926, copy of which is hereto ached and marked "Exhibit A."

3. That the taxes in controversy are income taxes for the calendar ar 1921, and the deficiency claimed is less than $10,000, to wit, 20.79.

4. The determination of tax contained in said deficiency is based on the following errors:

(a) That the commissioner erroneously proposes to make an assment against the taxpayer by reason of the fact that she received annuity of $5,000 under the will of the late James Gordon Bentt, which she failed to report as taxable income.

(b) The Commissioner of Internal Revenue erroneously claims at periodical payments of an annuity created by the will of a ceased person are taxable income in full to the annuitant, a distinon being recognized by the bureau between the value of the right receive an annuity, which is the property which passes by bequest, d the actual annual payments to the annuitant growing out of this ght, which are, it is claimed, income.

5. The facts upon which the taxpayer relies as the basis of her peal are as follows:

(a) James Gordon Bennett, a citizen of the United States of merica and resident of the State of New York, died in the Republic France on May 14, 1912, leaving a last will and testament dated ovember 11, 1910.

(b) The said last will and testament was duly admitted to probate by the surrogate's court in and for the county of New York, State of New York, to whom jurisdiction in that behalf belonged on September 27, 1919.

(c) Rodman Wanamaker and Guaranty Trust Company of New York are the duly qualified and acting executors of said last will and testament.

6 4. The said last will and testament contains the following provision:

"Tenth. I also give and bequeath to the said Sybel [sic] Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the twenty-ninth clause of his will the said decedent directed the incorporation by his executors of a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists," the purpose of which is to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years on any daily newspaper or journal then or thereafter published in the Borough of Manhattan, in the city of New York, and who are unable to care for themselves, or need such home or aid, and he gave all the residue of his estate to said corporation. Said decedent further provided by the thirtieth clause of his will as follows:

"For the purpose of paying any legacy or legacies or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lieu or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto.

7 "I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

(e) The corporation above referred to, viz, The James Gordon Bennett Memorial Home for New York Journalists Corporation, was duly incorporated and is a charitable corporation incorporated under the laws of the State of New York, with the approval of the State

board of charities, in May, 1919, and is now existing under the laws of the State of New York.

(f) No trust or fund was directed by the said will to be or has been set up by the said executors of the said will of James Gordon Bennett to provide for the payment of the bequest, legacy, or annuity to said taxpayer under the fifth clause of said will.

(g) The taxpayer in compiling her income-tax return, Form 1040, for the year 1920 set forth that she had paid in 1921 the sum of $5,000 on account of her annuity was a legacy and not advised by counsel that said annuity was a legacy and not income taxable to her.

6. The taxpayer in support of her appeal relies upon the following propositions of law:

(a) That the said annuity of $5,000 paid by said executors to the taxpayer in 1921 was or is property acquired by bequest and as such was and is not taxable as income.

(b) The gift, bequest, or legacy set forth in the tenth clause of said will was not and is not a gift of income, nor was nor is the sum or sums paid by the executors to the taxpayer for such annuity nor any part thereof income which is subject to taxation.

8 (c) The annuity mentioned in the tenth clause of said will is a bequest or legacy payable in instalments and as such was not and is not taxable as income.

(d) The said bequest or legacy does not constitute a trust the income of which is distributed periodically, and it does not fall within the terms of section 345 of Regulations 62, nor within the terms of the revenue act of 1921.

(e) The gift, bequest, legacy, or annuity contained in the tenth clause of said will is, when and as received by said taxpayer, principal and not income, and is not subject to tax under the sixteenth amendment of the Constitution of the United States, and any tax or attempt to tax such gift, bequest, legacy, or annuity is and will be unconstitutional and void and in violation of sections eight and nine of Article I of said Constitution.

(f) The fact that said executors may pay said gift, bequest, legacy, or annuity from funds in their hands partly or wholly derived from income collected by them on the assets of the estate does not thereby alter the nature of said gift, bequest, or legacy, nor render it or any part thereof income in the hands of the taxpayer.

On information and belief petitioner further alleges that in the year 1921 the estate of James Gordon Bennett paid to the State of New York, as transfer tax in behalf of petitioner due upon said annuity of $5,000 a year, the sum of $4,125.74, and in the same year paid in behalf of petitioner, on account of the inheritance tax on the right to receive said annuity of $5,000, to the State of Rhode Island the sum of $3,670.36; and the said estate also paid to the State of New Jersey, as an inheritance tax in behalf of petitioner upon said annuity of $5,000 a year, the sum of $1,347.55. Petitioner further

alleges that under the income-tax law in force at the time said payments were made all of said payments were properly deductible from the income of the petitioner for the year 1921. Petitioner further avers that, through failures to receive information from the estate of James Gordon Bennett prior to the filing of her income-tax return for said year, she failed to take a deduction for said sums on her income-tax return for said year 1921, and petitioner avers that upon the re-determination of the deficiency tax imposed by the Commissioner of Internal Revenue, referred to hereinbefore, that said items should be considered by this board and deducted from the taxable income of petitioner for said year 1921.

Wherefore the taxpayer respectfully prays that this board may hear and determine this appeal and that it be adjudged that the said deficiency tax is unwarranted in law, and that the same be entirely set aside.

SPOTSWOOD D. BOWERS,
Counsel for Taxpayer,
46 Cedar Street, New York, N. Y.

[*Duly sworn to by Edith S. Whitehouse; jurat omitted in printing.*]

Exhibit A to petition

Form NP-2

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 10, 1926.

IT:PA-1-60D, PBM-104.
MRS. SYBIL WHITEHOUSE,
Stone Villa, Newport, Rhode Island.

MADAM: The determination of your income-tax liability for the year 1921 discloses a deficiency in tax amounting to $920.79.

In accordance with the provisions of section 274 of the revenue act of 1924 you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement con-

senting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-1-60D, PBM-104. In the event that
11 you acquiesce in a part of the determination the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By C. R. NASH,
Assistant to the Commissioner.

Inclosures: Statements; agreement, Form A; Form 882.
Form 7861, revised May, 1925. 2-13281.

IT:PA:1-60D, PBM-104.

FEB. 10, 1926.

STATEMENT

In re: Mrs. Sybil Whitehouse, Stone Villa, Newport, Rhode Island. 1921, deficiency in tax, $920.79.

You report the receipt of $5,000.00 representing an annuity payable out of the income of the estate of James Gordon Bennett. This income was not included for taxation.

Section 213 of the revenue act of 1921 provides:

"That for the purpose of this title the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of the interest in such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit; or gains or profits, and income derived from any source whatever."

In accordance with the above this annuity of $5,000.00 has been included in your net income and is subject to normal tax of 8%, or $400.00, and surtax as follows:

12

$640.50 at 9%	$57.65
$2,000.00 at 10%	200.00
$2,000.00 at 11%	220.00
$359.50 at 12%	43.14
Additional surtax	520.79
Additional normal tax:	400.00
Total deficiency	920.79

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1921, the bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3708 to discuss your case before mailing formal notice of its determination as provided by section 274

(a) of the revenue act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to make an immediate assessment under the provisions of section 274 (d) of the revenue act of 1924 or to issue a formal notice of deficiency. Therefore the bureau has elected to issue this notice of deficiency, believing it will be more satisfactory than an immediate assessment.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Before United States Board of Tax Appeals

Answer

Filed June 7, 1926

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations in said paragraph of the petition.

13 2. Admits the allegations in said paragraph of the petition.

3. Admits the allegations in said paragraph of the petition.

5 (a), (b), and (c). Admits that James Gordon Bennett died leaving a last will and testament which was duly admitted to probate in the State of New York, and that the estate of said decedent was administered under said will.

5 (d). Admits that the said will of said decedent bequeathed to the taxpayer an annuity of $5,000.00. For want of knowledge or information sufficient to form a belief neither admits nor denies the other allegations of said paragraph of the petition, but calls for proof thereof.

5 (e) and (f). For want of knowledge or information sufficient to form a belief neither admits nor denies the allegations of said paragraph of the petition, but calls for proof thereof.

5 (g). Admits the allegations in said paragraph of the petition.

Wherefore it is prayed that the appeal of the above-named taxpayer be denied.

A. W. Gregg,
General Counsel, Bureau of Internal Revenue.

Of counsel:
Thomas P. Dudley, Jr.,
Special Attorney, Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing answer certified from the record as a true copy.

[SEAL.] B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

14 Before United States Board of Tax Appeals

Docket Nos. 6243, 10644, 13220. Promulgated July 8, 1927.

RONALD DE REUTER, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HENRIETTA D'ARAMON, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SYBIL WHITEHOUSE, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Where the testator bequeathed to petitioner an annuity and where his will contained no direction to pay the annuity out of the income of his estate, held, that the moneys received by petitioner as payments of his annuity is exempt from income tax, under the provisions of section 213 (b) (3) of the revenue act of 1921.

Frederick R. Coudert, Esq., Thomas Kelly, Esq., Blount Ralls, Esq., Robert W. Candler, Esq., and S. D. Bowers, Esq., for the petitioners.

Thomas P. Dudley, jr., Esq., for the respondent.

The above proceedings were, by agreement, consolidated and heard together and involve deficiencies in income tax in the case of Ronald de Reuter, for the calendar year 1923, in the sum of $1,470; in the case of Henrietta d'Aramon, for the calendar year 1923, in the sum of $630; and in the case of Sybil Whitehouse, for the calendar year 1921, in the sum of $920.79. These deficiencies arise by reason of the fact that the commissioner included in gross income for each petitioner a certain annuity bequeathed to petitioner by the will of James Gordon Bennett. Petitioner Sybil Whitehouse further contends that the commissioner erred in not permitting the deduc-
15 tion of certain death taxes paid by the estate of James Gordon Bennett to the States of New York, New Jersey, and Rhode Island. In a brief filed in behalf of said petitioner this last contention has been withdrawn.

FINDINGS OF FACT

The petitioner Ronald de Reuter is a nonresident alien, a citizen of France, and resides at 37 Avenue d'Iona, Paris, France. Petitioner Henrietta D'Aramon is a nonresident alien, a citizen of France, resident at No. 1 Boulevard La Tour, Maubourg, Paris, France. Petitioner Sybil Whitehouse is a resident of the city of Newport, Rhode Island, and her principal place of business is at Stone Villa, Newport, Rhode Island.

James Gordon Bennett, a citizen of the United States, and a resident of the State of New York, died in the Republic of France, May 24, 1918, leaving a last will and testament, the material portions of which are:

"Third. I give and bequeath to my wife Maud an annuity of fifty thousand dollars, to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

"Fourth. I give and bequeath unto my sister Jeanette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

"Fifth. I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Sixth. I give and bequeath to my niece Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand
16 dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Eighth. I give and bequeath to my step-son Ronald de Reuter an annuity of twenty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Ninth. I give and device absolutely, and in fee simple, to Sybil Douglas, wife of William Whitehouse, my cottage, or Stone Villa, consisting of a parcel of land and buildings thereon, situated at Newport, in the State of Rhode Island, known as "Stone Villa," to have and to hold the same to her, her heirs, and assigns forever; and if during my life I shall sell the said cottage, then and in such case I give and bequeath unto the said Sybil Douglas, wife of William Whitehouse, a sum equal to the amount for which I shall have sold the said cottage.

"Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the eleventh to twenty-fifth clauses, inclusive, the testator bequeaths annuities ranging from $500 to $5,000 to various persons. Then follows:

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual reckoning from the time of my death.

"Twenty-sixth. I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

17 "Twenty-ninth. It is my long-cherished intention and purpose and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose I dir[illegible] the executors of this my will, hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan, in the city of New York, and who shall, by reason of old age, accident, or bodily infirmity, and through lack of means, be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald Company Societe Anonyme Francaise upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram news-

18 paper. The said memorial home corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property, real and personal and of every kind and nature and wheresoever situ-

ated, which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such home corporation shall be so duly incorporated and entitled to receive such residuary estate and property I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such memorial home corporation shall own and as soon as the due administration of my estate shall permit receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Societe Anonyme Francaise which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock it shall from time to time elect such persons as directors of said the New York Herald Company and said the New York Herald Company Societe Anonyme Francaise as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald corporations shall so
19 manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations, or either of them, as shall provide reserve or surplus funds sufficient, in their judgment, to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will, hereafter named, and each persons who may at any time be an executor of my will, shall be and act as a director of such memorial home corporation and a director of each of said corporations, the New York Herald Company and the New York Herald Company Societe Anonyme Francaise. It is also my will and I direct that each executor of this my will who shall act as a director of such memorial home corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in ad-

dition to any commissions or compensations which he may receive or be entitled to for his service as an executor of this will.

"Thirtieth. I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of
20 this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignn ents, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said memorial home corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will."

All the annuities involved in these proceedings, to wit, those paid the petitioners Ronald de Reuter and Henrietta d'Aramon in the year 1923, and to Sybil Whitehouse in the year 1921, were paid by executors of the will of James Gordon Bennett out of the income of the estate. In November, 1921, the executors of the will of James Gordon Bennett filed in the surrogate's court for the county of New York, State of New York, an intermediate account of settlement which was thereafter approved by said court. That account showed that all of the annuities herein involved were, prior to
21 November 14, 1920, paid out of the corpus of the estate, and all such annuities were, on and after November 14, 1920, paid out of the income of the estate. The total amount of the annuities payable in 1920 was $144,000. The account of settlement shows that the

executors, on December 30, 1920, permanently set aside to James Gordon Bennett Memorial Home for New York Journalists Corporation, which was organized under the laws of New York in May, 1919, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges, the following assets:

Promissory notes of Frank A. Munsey Co.	$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon	450.00
$34,900 U. S. Victory loan bonds, amount invested therein	34,741.24
Balance of cash uninvested	78.76
Total	3,133,260.00

OPINION

MILLIKEN: In view of the conclusion which we have reached, we find it necessary to discuss but one question and that is, whether the annuities received by the petitioners under the will of James Gordon Bennett constitute income which is taxable by reason of the provisions of the revenue act of 1921. The applicable provisions of that act are:

"SEC. 213. That for the purpose of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

. . . . . .

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) . . .

"SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdi-
23 vision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The question presented is whether the annuity received by each of the petitioners was a "bequest" which was exempt from income tax under section 213, or constituted distributive income which was taxable under section 219. This question depends upon the construction of the will of James Gordon Bennett. The seventh, eighth, and tenth clauses of that will bequeathed to the respective petitioners "an annuity." No limit is placed upon the payment of these annuities. The only direction is that they be paid. The whole estate is charged with their payment. The only way in which any part of the estate can be freed from this charge is found in
the thirtieth clause, where the executors are given the power
24 to convert property into money and where it is provided that the property "so sold, conveyed, * * * or exchanged

shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto." It is to be noted, however, that this very power of sale or conversion is given to the executors for, among other purposes, the payment of the annuities. So that while the property sold is free of the charge, it is clear that the proceeds remain subject to the payment of the annuities.

Respondent invites our attention to the following excerpt from the thirtieth clause.

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

Giving this provision its broadest construction, it is apparent that there is nothing therein to the effect that any annuity is payable out of the income of the personality so to be set apart. If such fund, if created, should fail, it is our opinion that the remaining corpus of the estate would remain liable for the satisfaction of the annuities. In those cases where it was the clear intention of a testator that an annuity should be paid out of income or out of a particular fund, such intention must be given full effect. (See Delaney v. Van Aulen, 84 N. Y. 16, and Irwin v. Wollport, 128 Ill. 527; 21 N. E. 501.) On the other hand, where an annuity is given without limitation and the will merely indicates that the annuity may be paid out of income, the corpus is liable when the income becomes insufficient. Thus it was said by Judge Donio in Pierrpont v. Edwards, 25 N. Y. 128:

"The only question which I think it necessary to consider, in this case, is whether the bequest of the annuity of $7,000
25 a year, to the testator's wife, was specific, in the sense that if it could not be paid out of the fund indicated—namely, the income of the trust estate—it was to fail, or to abate, in proportion that the indicated fund should prove deficient; or on the other hand, whether it was intended by the testator that it should be paid; at all events the income of his property given to the trustees being pointed out by way, it is called, of demonstration. I am of opinion that the last mentioned construction is the one which we are bound to place upon the instrument, * * * The leading principle of the cases is that when the testator bequeaths a sum of money, or which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund. (Sir James Wigram in Dickin v. Edwards, 4 Hare. 273.)"

Reading the will of James Gordon Bennett as a whole, it at once becomes apparent that the annuities which it bequeaths are charges upon its whole estate, income, personalty and realty. The James

Gordon Bennett Memorial Home is a residuary legatee and devisee, and gets only what may be left after the annuity charges are paid.

That the annuities provided by the will are in fact bequests seems clear. (See Pierrpont v. Edwards, supra; Clark v. Clark, 147 N. Y. 639; 42 N. E. 275; *Canal Bank* v. *Hudson*, 111 U. S. 66; 3 C. J. 202.)

Are those annuities bequests of income within the meaning of section 219 or are they bequests as that term is used in section 213?

Long before the sixteenth amendment to the Constitution became effective a broad distinction had been drawn between a bequest of a pure annuity and a bequest of income. Thus it is said in section 2 of Chapter XIII of Remson on The Preparation and Contest of Wills (1907):

26 "An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount. "Annual taxes on principal are deducted from a use or income but not from annuities. * * *

"Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the corpus or payable only out of the income. Thus under 'a clear gift of an annuity, a direction to set a fund apart to secure it, which is to fall into the residue upon the death of the annuitant,' the corpus is still liable to make good arrears. 'But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remaindermen.' So, if it is clear that the annuity is to be paid only out of the income each year, or that the corpus is to be looked upon as an entirety after the annuitant's death, the corpus will not be liable for arrears. In the absence of an expressed intent to the contrary the testator's personal estate is primarily liable for the payment of an annuity. In some States it is provided by statute that if the funds or property out of which annuities are payable fails resort may be had to the general assets, as in case of a general legacy. Some testators provide for the purchase of annuities; some create a trust for their payment; others simply direct their payment out of the estate."

In Pock v. Kinney (C. C. A., 143 Fed. 76), it is said:

"There is this distinction between income and an annuity. The former embraces only the net profits after deducting all necessary expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. (Ex parte McComb, 4 Bradf. Sur. (N. Y.) 151, 152.) 'An annuity is defined as

27 "a stated sum, payable annually" Pearson v. Chase, 10 R. I. 455), or as "a yearly payment of a certain sum of money granted to another in fee, for life, or for years" (Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580; Bartlett v. Slater, 53 Conn. 102, 2

Atl. 678, 55 Am. Rep. 73.' (Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300.) It is a grant of a certain sum of money payable at the expiration of fixed, consecutive periods, for a definite term or for life. (Lumley's Law of Annuities, 1.)"

The court then quotes from the oft-cited case of Booth v. Ammerman (4th Bradford, 129). From the last case we make the following excerpt:

"An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount varying according to the income or profits, though a certain fund may be provided, out of which it is to be payable. * * * The income or interest of a certain fund is not an annuity, but simply profits of certain property, to be earned, which may vary more or less."

To the same effect see Dulaney v. Dulaney (105 Va. 429, 54 S. E. 40) and Overton v. Lea (106 Tenn. 505, 68 S. W. 250).

From the above, three things become apparent: (1) That each annuity herein involved is in fact a bequest, (2) that these annuities do not constitute bequests of income, and (3) that each annuity is a charge upon the whole estate.

Since no income, nor any share of income, has been bequeathed to any one of the petitioners, it can be held that such petitioner was entitled to a "distributive share of the income of the estate or trust," which is taxable under section 219. We can not see that the fact that the number of years during which a legacy is payable is determinable by the life of the beneficiary makes that income which otherwise is not income.

28 Respondent contends that these proceedings are governed by Irwin v. Gavit (268 U. S. 161) and Heiner v. Beatty (17 Fed. (2d) 743). In our opinion these cases are not in point. In the Gavit case there was a bequest of a certain share of income arising from a certain trust fund. In these proceedings we have no bequest of income, but a bequest of a sum certain, payable at all events each year so long as the legatee lives. In the Beatty case the testator, Carnegie, did bequeath an annuity but he made the annuity payable (in the case the executors did not purchase it from an insurance company) out of the income of a trust fund. The Circuit Court of Appeals reversed the decree of two judges of the lower court (10 Fed. (2) 390), holding the annuity exempt from income tax, but in so doing placed their decision squarely on the ground that the bequest was one of income from a trust. Thus the appellate court said:

"The first part of the Carnegie will with which we are concerned is the fifth article. It reads as follows:

"'Fifth. I give to each of the persons hereinafter in this fifth article named an annuity of the annual amount in this fifth article set after his or her name, to be paid semi-annually during the annuitant's life, that is to say, to * * * Mr. Beatty, art-dept., wife succeeding, five thousand dollars.'

"If the will had stopped there, it is possible the testator's provision for John W. Beatty would have been a bequest, payable in semi-annual installments directly from the estate, and all payments made to him year by year would have been exempt from taxation under paragraph 3 of subdivision (b) of section 213 of the cited act (Comp. St. §6336 1/8ff). However, the will did not stop there, but, going on, it provided in the very next article, by words whose significance we have emphasized by italics, as follows:

"'Sixth. I direct my executor and *trustee* either *to set apart, hold in trust, invest and keep invested, in separate funds, one for each annuitant*, sufficient sums to *produce* by the clear net interest and *income* thereof respectively, the several annuities provided in the fifth article of this will, * * * and to pay the said several annuities *from the* interest and *income of the respective funds* in semi-annual payments, or to purchase such annuities in life insurance companies. * * *'

"By the eighth article the testator authorized his executor and trustee (who is one corporate person), 'in its discretion, to retain for investment of the principal of any of the trusts, herein provided for, any of the securities left by me.' And, finally, by the same article he authorized the executor and trustee to sell any of the securities coming into its hands and reinvest the proceeds.

"Recapitulating, these provisions created, somewhat inartificially, yet, we think, with no lack of certainty, out-and-out trusts. They provided a capital sum for each annuitant, directed that it be 'set apart' and 'held in trust' for him and that from the interest and income therefrom accruing payment of a definite sum to be made to him semiannually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants. For John W. Beatty it took, 'set apart,' and 'held in trust' one $100,000 United States Steel Corporation registered 50-year 5 per cent gold bond and two $5,000 bonds of the same issue, and of the interest received therefrom it paid him $5,000 a year. This is what was done. But the testator directed, in the alternative and at the trustee's election, another way by which the trustee could provide for the payment of the annuities, namely, by taking a part of the principal of the estate and with it buy annuities. Thus in both ways the testator willed that parts of the corpus of his estate be appropriated as capital sums from which income in amounts sufficient to pay the annuities could be obtained. In neither way—indeed, nowhere in the will—did he provide for payment of annuities from the principal of his estate. In other words, the testator, through alternative ways, specifically indicated and fully provided the sources of income to be paid the annuitants. What the will intended the annuitant here to receive and what actually he did receive was the income derived from a source which, we think, is sufficiently

definite to fall within the statute's denomination of 'income derived from any source whatever.'"

We look in vain for a provision in the Bennett will similar to that in the Carnegie will. We find no bequest of income.

Respondent cites Cummings' Executor v. Cummings (146 Mass. 301, 16 N. E. 401), to the effect that annuities such as those before us are payable primarily from income. The same would be true of any legacy, for no court would permit an executor to sell property to pay a legacy if he had income available. So also such a legacy is payable out of personalty rather than realty. All these are matters of administration with which annuitants have no concern.

Next it is contended that since the annuities were paid, in the taxable years involved, from income, the annuities constitute income. It may be noted that during the first two years after Bennett's death all the annuities herein involved were paid out of the corpus of the estate. The same, for all we know, may be done later. It is because certain testators have thought that they had ample means to pay annuities and their expectations have failed, that the cases which we have cited, have arisen. The fact that income is used to pay an obligation does not necessarily make what was income to the payer, income to the payee. The payment by one from his salary of borrowed money without interest does not make the money so paid income to the recipient. Neither would the payment of a simple legacy from income of an estate make the legacy taxable as income.

Respondent calls our attention to the language of Mr. Justice Holmes in Irwin v. Gavit, supra, where he states that if the income therein involved was not taxable, Congress "has missed so
81 much of the general purpose that it expresses at the start."

We have not before us the question of the extent to which the income of the estate of James Gordon Bennett is taxable, and express no opinion on that question. All we have before us is whether these annuities constitute taxable income in the hands of the beneficiaries. But even if our decision should result in this income becoming nontaxable at all events, we can only say that this results from the provisions of the law. The Supreme Court, construing the same act that was construed in the Gavit case, held in Smietanka v. First Trust & Savings Bank (257 U. S. 602), that income received by a trustee to be accumulated for unborn and unascertained beneficiaries was not taxable.

We are aware that the British courts have held that annuities similar to those here involved are subject to the British income tax, but in Merchants Loan & Trust Co. v. Smietanka (255 U. S. 509), it was said:

"The British income-tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved."

We have for application sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any

possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income. On the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett, out of income. To hold that the mere fact that in the taxable years involved, the annuities were paid out of income and therefore were distributive income to the recipients, would give a construction to the taxing statute far be-
32 yond the meaning of the words used. When we are compelled to chose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt.

Judgment will be entered on 15 days' notice, under rule 50.

A true copy. Teste.

B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

Dissenting opinion

Smith, dissenting: I perceive no valid distinction between this case and that of Irwin v. Gavit (268 U. S. 161). The case arose under the revenue act of 1918, which imposed an income tax upon income "arising or accruing from all sources" and included "the income from but not the value of property acquired by gift, bequest, devise, or descent." During the years 1913, 1914, and 1915 Gavit received the income from a certain fund as a bequest. The court held that it was liable to income tax and said:

"But we think that the provision of the act that exempts bequests assumes the *gift of a corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so called simply because of the severance between it and the principal fund * * *. The money was income in the hands of the trustees, and we know of nothing in the law that prevented its being paid and received as income by the donee." (Italics ours.)

If a gift of a corpus is the "bequest" that is not liable to income tax, then the petitioners in the case at bar did not receive a bequest. They simply received an annuity which, during the taxable year, was paid from the income of the estate. Clearly under section 219 (d) of the revenue act of 1921 the fiduciary making the estate income-tax return was entitled to deduct from gross income the amount of the annuity paid to each of the petitioners during the taxable year. Under the decision of the board neither the fiduciary nor the beneficiary can be held liable to income tax in respect of the income received.

33 Furthermore, under the decision of the court in Irwin v. Gavit, supra, the petitioners in the case at bar had an interest in the estate of the decedent and the income from that inter-

set is liable to income tax the same as the income which Gavit received in the above-cited case.

Now, October 4, 1928, the foregoing findings of fact, opinion, and dissenting opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals

Before U. S. Board of Tax Appeals

Order and decision redetermining deficiency

Pursuant to the decision of the board promulgated July 8, 1927, in the above-entitled proceeding, the commissioner having filed a proposed final determination with notice of settlement and the petitioner having made no objection to such proposed determination, it is

Ordered, adjudged, and decided that there is no deficiency for the year 1921.

(Signed) B. H. LITTLETON,
Chairman, United States Board of Tax Appeals.

Dated, Washington, D. C., October 15, 1927.

Now, October 4, 1928, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Petition for review to the Circuit Court of Appeals for the First Circuit

Filed April 7, 1928

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant
34 Attorney General, and C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows:

I. The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The commissioner is informed and believes and upon such information and belief avers that Sybil Whitehouse (hereinafter referred to as the taxpayer) is an inhabitant of the city of Newport, in the State of Rhode Island, and is an inhabitant of the judicial circuit of the Circuit Court of Appeals for the First Circuit.

II. The commissioner determined a deficiency against the taxpayer in income tax for the year 1921 in the amount of $920.79 and

on February 10, 1926, in accordance with the provisions of section 274 of the revenue act of 1924, sent to the taxpayer by registered mail a notice of said deficiency. The taxpayer on April 8, 1924, filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. In and by her said appeal the taxpayer alleged that the commissioner had erred in determining the deficiency aforesaid in that the commissioner determined that the sum of $5,000.00 paid to the taxpayer in 1921 by the executors of the will of James Gordon Bennett, pursuant to the tenth clause of said will, constituted taxable income to the taxpayer under the revenue act of 1921.

James Gordon Bennett, a citizen of the United States, and a resident of the State of New York, died on May 24, 1918, leaving a last will and testament, which was duly admitted to probate in the surrogate's court for the county of New York, State of New York. In any by the tenth paragraph of said will the testator gave and bequeathed to the taxpayer an annuity of $5,000.00, to be paid to her in equal semi-annual payments in each year during her life, reckoning the years from the date of the death of the testator.
35 In said will the testator also made bequests of annuities in various amounts to other individuals, all of the said bequests of annuities being of similar tenor and in similar terms except as to the respective amounts thereof to the bequest of the annuity to the taxpayer.

In the twenty-ninth paragraph of said will the testator directed the executors of the will to cause to be incorporated a corporation, to be known as The James Gordon Bennett Memorial Home for New York Journalists Corporation, which corporation should provide and maintain a home for indigent journalists, and in said paragraph the testator gave, devised, and bequeathed the entire residue of his estate to the said corporation to be formed. In the thirtieth paragraph of said will the testator authorized the executors of the will to sell or otherwise dispose of any real or personal property of the estate for the purpose of paying legacies, annuities, debts, and expenses and authorized said executors to retain and hold any personal property to provide for the payment of said annuities.

Up to November 14, 1920, all of the annuities provided for in said will were paid out of the corpus of the estate of said James Gordon Bennett. From and after said last mentioned date all of said annuities were paid by the said executors entirely out of the income from said estate, and the annuity of $5,000.00 paid to the taxpayer in 1921 was paid entirely out of said income. The said executors of the will of said James Gordon Bennett filed in the surrogate's court for the county of New York, State of New York, an intermediate account of their proceedings as such executors up to November 30, 1921, which account was thereafter approved by said court. In and by said account the said executors stated and showed, among other things, that on December 30, 1920, they, the said executors, per-

manently set aside certain bonds, mortgages and other securities, constituting a large part of the estate at the time, as part of the residuary estate and as the property of the said James Gordon Bennett
36 Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary.

The hearing of this appeal of the taxpayer by the Board of Tax Appeals was held on December 1, 1926, which date was after the enactment of the revenue act of 1926. On July 8, 1927, the Board of Tax Appeals issued its findings of fact and opinion in said appeal, wherein and whereby the board held that the annuity paid to the taxpayer in 1921 under the said will was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921. On October 13, 1927, the Board of Tax Appeals entered a final order of redetermination in said appeal, wherein and whereby the board ordered and decided that there was no deficiency against the taxpayer for the year 1921.

III. The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision, and final order of redetermination and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

(1) The board erred in holding that the annuity paid to the taxpayer in 1921 was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

(2) The board erred in not holding that the annuity paid to the taxpayer in 1921 was not exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

37 (3) The board erred in holding that the amount of the annuity paid to the taxpayer in 1921 constituted the value of property acquired by gift, bequest, devise, or descent within the meaning of section 213 (b) (3) of the revenue act of 1921.

(4) The board erred in not holding that the amount of annuity paid to the taxpayer in 1921 did not constitute the value of property acquired by gift, bequest, devise, or descent within the meaning of section 213 (b) (3) of the revenue act of 1921.

(5) The board erred in not holding that the annuity paid to the taxpayer in 1921 was required to be paid entirely out of the income from the estate of James Gordon Bennett.

(6) The board erred in not holding that the annuity paid to the taxpayer in 1921 constituted income of the estate of James Gordon Bennett during the period of administration or settlement of the

said estate, which income was properly paid to the taxpayer and was distributable to the taxpayer during the year 1921, pursuant to the instrument or order governing the distribution thereof, and that such annuity constituted taxable income to the taxpayer within the meaning and purview of paragraphs (c) and (d) of section 219 of the revenue act of 1921.

(7) The board erred in not holding that the annuity paid to the taxpayer in 1921 constituted income of the estate or trust created under the will of James Gordon Bennett, which income was, pursuant to the will or order governing the distribution thereof, distributable to the taxpayer in said year and that such annuity constituted taxable income to the taxpayer within the meaning and purview of paragraphs (a) (4), (d), and (e) of section 219 of the revenue act of 1921.

(8) The board erred in not finding as a fact that the securities of the estate of James Gordon Bennett, set aside by the executors on December 30, 1920, were so set aside upon the following, among other, terms and conditions, to wit: That the income from said securities was to be used for the payment of the annuities provided for in the will as far as might be necessary.

(9) The findings of fact made by the board are against the evidence.

(10) The findings of fact made by the board are not supported by the evidence.

(11) The decision of the board is not supported in law by the findings of fact made by the board.

(12) The decision of the board is not supported in law by the evidence.

(13) The board erred in redetermining that there is no deficiency in income tax against the taxpayer for the year 1921.

(14) The board erred in not redetermining that the deficiency against the taxpayer in income tax for the year 1921 was the amount determined by the commissioner.

IV. The commissioner, being aggrieved and prejudiced by the said decision and order of redetermination of the Board of Tax Appeals, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit; wherefore he petitions that a transcript of the record be prepared in accordance with the rules of the Circuit Court of Appeals for the First Circuit and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the First Circuit.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

30 [*Duly sworn to by C. M. Charest; jurat omitted in printing.*]

Before U. S. Board of Tax Appeals

Notice of petition for review

Filed Apr. 16, 1928

To SYBIL WHITEHOUSE,
Stone Villa, Newport, R. I.

Notice is hereby given to you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D. 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this —— day of April, A. D., 1926.

SYBIL WHITEHOUSE.

40 Before U. S. Board of Tax Appeals

Notice of petition for review

Filed April 13, 1928

To SHERWOOD D. BOWERS, Esq.,
% Laughlin, Gerard, Bowers & Halpin,
57 William Street, New York, N. Y.
Attorney for Sybil Whitehouse, Respondent on Review.

Notice is hereby given to you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D., 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and a copy of the petition for review mentioned in said notice is acknowledged this 9th day of April,

A. D., 1928, by the undersigned attorney for Sybil Whitehouse, respondent on review in the above-entitled proceeding.

SHERWOOD D. BOWERS.

Now, October 4, 1928, the foregoing petition for review and notice of filing certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Statement of evidence

Lodged Jun. 26, 1928; Filed Sep. 21, 1928

The above-entitled appeal, together with the appeals of Ronald de Reuter, Docket No. 5243, and Henrietta d'Aramon,
41 Docket No. 10644, came on for hearing before the board on December 1, 1926, pursuant to written stipulation filed with the board by counsel for the parties in all three appeals. At the hearing it was stipulated between the counsel for all parties that the three appeals be consolidated for hearing and that the evidence in any appeal should apply as well to the others.

There was received in evidence the depositions of R. W. Candler and Rowland E. Cocks, witnesses on behalf of Ronald de Reuter, taken before Albert Gerber, a notary public in and for the county of New York, in the State of New York, which depositions were taken pursuant to order duly entered by the board.

The deposition of E. W. CANDLER was as follows:

Direct examination:

York city. I have a certified copy of the certificate of incorporation of the corporation known as The James Gordon Bennett Memorial Home for New York Journalists Corporation.

(There was received in evidence, as taxpayer's Exhibit 1, a copy, certified to be correct by the clerk of New York County, State of New York, and clerk of the Supreme Court, of the certificate of incorporation of The James Gordon Bennett Memorial for New York Journalists Corporation, which certificate of incorporation was signed and acknowledged by the incorporators of said corporation on May 10, 1919, approved by a justice of the Supreme Court of the State of New York on May 12, 1919, filed and recorded in the office of the secretary of the State of New York on May 16, 1919, and filed and recorded with the clerk of New York County, State of New York, on May 17, 1919, to which certificate of incorporation was attached an order of the State board of charities of the State of New York entered May 15, 1919, approving the incorporation of said The James Gordon Bennett Memorial Home for New York Journalists Corporation.)

42 Witness resuming:

I am secretary and treasurer and one of the directors of The James Gordon Bennett Memorial Home for New York Journalists Corporation. I have in my custody the minute book of the corporation, have transcribed or caused to be transcribed in that minute book all proceedings of the directors, and have attended the meetings of directors since its incorporation. The directors of the corporation have not taken any action, or adopted any resolution, for the dissolution of the corporation or the surrender of its charter. The minute book contains no record whatever of the dissolution or contemplated dissolution of the corporation, and the corporation is still actively in existence.

(There was no cross-examination.)

The deposition of ROWLAND E. COCKS was as follows:

I am personal trust officer of the Guaranty Trust Company of New York, which is one of the executors of the will of James Gordon Bennett. I am familiar with the proceedings of the Guaranty Trust Company as the executor of the James Gordon Bennett will and have followed the administration of the estate through since the appointment of this company as such executor in 1919.

The Guaranty Trust Company has the custody or possession of the securities belonging to the James Gordon Bennett estate. The funds or income of the estate pass through the accounts of the Guaranty Trust Company, and the company, as executor, keeps all the estate records, cash records, and security records. I am familiar with the accounts and records of the James Gordon Bennett estate. I now produce a certified copy of the will of James Gordon Bennett, dated November 11, 1916.

(There was received in evidence, as taxpayer's Exhibit 2, a copy of the will of James Gordon Bennett, certified to be a correct
43 copy under the seal of the surrogate's court of New York County, State of New York. The material provisions of the will were as follows:

Exhibit 2

I, James Gordon Bennett, a citizen of the United States of America, and of the State of New York, and a resident of number 37, West Forty-seventh Street, in the Borough of Manhattan, in the city of New York, hereby make, publish, and declare this to be my last will and testament, as follows:

First. I intend to leave at my death a will disposing of all my real and personal property situated in the Republic of France, and this will is not intended to in any way affect or dispose of any property situated in France disposed of by such other will, but it is my intention by this will to dispose of all property not disposed of by such will, which at the time of my death shall belong to me or be subject to my disposal by will.

. . . . . .

Third. I give and bequeath to my wife Maud an annuity of fifty thousand dollars, to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

Fourth. I give and bequeath unto my sister Jeanette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

Fifth. I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

Sixth. I give and bequeath to my niece Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

44 Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

Eighth. I give and bequeath to my step-son Donald de Reuter an annuity of twenty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.

(In and by the eleventh to the twenty-fifth clauses, inclusive, the testator gave and bequeathed to various individuals annuities of various amounts, each of said bequests being in the same terms, except as to names and amounts, as the bequest in the tenth paragraph.)

All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semi-annual payments, reckoning from the time of my death.

Twenty-sixth. I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

Twenty-seventh. Each devise, bequest, and annuity, given by the preceding articles of this my will, shall be over and above, and free from, any and all legacy, inheritance, or transfer tax or taxes, or duty or duties, and I direct that any and all such tax or taxes, duty or duties, upon or in respect of, or upon or in respect of the transfer of such devise, bequest, and annuity, shall be paid by my executors out of my estate, as part of the expense of administration thereof,

so that each devisee, legatee, and annuitant shall receive the full amount of each devise, bequest, or annuity hereby given to him or her, free from any such tax or duty.

Twenty-eighth. Each legacy or annuity hereby given to a woman now or hereafter married shall be for her own separate use, and not subject to the debts or control of her husband. Each such legacy and annuity shall be payable to the legatee or annuitant in person only, and on her or his personal receipt, and shall be inalienable, and not capable of anticipation, pledge or transfer, in whole or in part, by the legate or annuitant. All annuities hereby given shall commence at the time of my death and be payable in equal parts half-yearly, except as hereinabove specifically mentioned.

Twenty-ninth. It is my long-cherished intention and purpose and it my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose I direct the executors of this my will, hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan, in the city of New York, and who shall by reason of old age, accident, or bodily infirmity, and through lack of means, be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald Company Societe Anonyme Francaise upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram newspaper. The said memorial home corporation shall establish and maintain a suitable building or suitable buildings and grounds and

appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such persons or persons by pecuniary or either contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property, real and personal and of every kind and nature and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such home corporation shall be so duly incorporated and entitled to receive such residuary estate and property I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such memorial home corporation shall and as soon as the due administration of my estate shall permit receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Societe Anonyme Francaise which shall belong to me at my death and form part of my residuary estate and property, and that by virtue
47 of its ownership of such stock it shall from time to time elect such persons as directors of said the New York Herald Company and said the New York Herald Company Societe Anonyme Francaise as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such memorial home corporation and a director of each of said

corporations the New York Herald Company and the New York Herald Company Societe Anonyme Francaise. It is also my will and I direct that each executor of this my will who shall act as a director of such memorial home corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

48 Thirtieth. I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executive of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said memorial home corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will.

(Signed and witnessed on November 11, 1916.)

49 Witness resuming:

I am familiar with the terms of the will and with the eighth clause of the will by which the testator gave and bequeathed

to Ronald de Reuter an annuity of $20,000, to be paid in semi-annual payments during each year of his life. I know that the sum of $20,000 has been paid to Ronald de Reuter each year in accordance with that clause of the will. I know that the executors of the James Gordon Bennett estate have not set apart or constituted a separate trust or trust fund to produce or provide the sum of $20,000 a year to pay the annuity to Ronald de Reuter. The will of James Gordon Bennett did not appoint any trustees.

Cross-examination:

All of the securities which I testified were in the possession of the executor are held by the Guaranty Trust Company to pay not only this annuity but other annuities in the will. I am sure that the annuities for the year 1923 were paid out of the income from the securities in the possession of the executor.

Re-direct examination:

The executors are holding the securities and assets constituting the estate of James Gordon Bennett.

(There was received in evidence, as taxpayer's Exhibit 3, a copy, duly certified to be correct, of a decree or order entered on August 10, 1922, by the surrogate of New York County, approving and settling the intermediate account of the executors of the will of James Gordon Bennett down to and including the 30th day of November, 1921.)

Witness resuming:

The securities which I testified are at present held by the executors are held as set apart on their books for the residuary devisee and legatee, subject to the payment of taxes, annuities, and other charges, in the same manner as they were held in November, 1921.

50 (This concluded the deposition of Rowland E. Cocks.)

By agreement of counsel for all parties at the hearing, there was received in evidence, as an exhibit, a copy, duly certified to be correct, of the intermediate account of the executors of the will of James Gordon Bennett to November 30, 1921. The material portions of this account were as follows:

Exhibit in evidence

Summary

AS TO THE PRINCIPAL OF SAID ESTATE

The said executors charge themselves as follows:

With amount of—

Cash received from sales of real property, as shown by Schedule A, Part II	$753,697.18
Cash belonging to testator at the time of his death, as shown by Schedule A, Part III	7,071.38
Cash received from sale of personal property and as shown by Schedule A, Part IV	1,496,972.65
	2,259,741.41

And they ask to be credited as follows:
With amount of—

Expenses on sale of real property, as shown by Schedule B, Part I	$1,523,051.98	
Expenses of administration, as shown by Schedule B, Part II	202,757.37	
Payments to creditors, as shown by Schedule B, Part III	10,692.49	
Legacies paid, as shown by Schedule C, Part I	53,646.02	
Payments from principal on account of annuities, as shown by Schedule C, Part II	276,500.00	
51 Proceeds of mortgages reinvested, as shown by Schedule C, Part III	34,741.24	
		2,103,389.05
Leaving a cash balance of principal of		156,352.36

with which the said executors charge themselves as of November 30, 1921, the date to which this account is brought down.

AS TO THE INCOME OF THE SAID ESTATE

The said executors charge themselves as follows:
With amount of income received, as shown by—

Schedule A, Part II	$105,704.10
Schedule A, Part V	225,150.65
	330,854.75

And they asked to be credited as follows:
With the amount of—

Expenses, as shown by Schedule B, Part IV	$42,832.68	
Payments from income on account of annuities, as shown by Schedule C, Part II	209,175.31	
Payments on account of The James Gordon Bennett Memorial Home, as shown by Schedule C, Part IV	21,120.00	
		273,127.99
Leaving a cash balance of income of		57,726.76

with which the said executors charge themselves as of November 30, 1921.

52 SCHEDULE A, PART II

A statement of all real property mentioned in Schedule A, Part I, sold by said executors, the details of such sales, the moneys received therefore, including principal and interest received on purchase money, mortgages, and moneys received on installment contracts.

SUMMARY

	Purchase price	Cash paid	Original amount of bond and mortgage	Original amount of installment contracts	Balance due	Interest received
Fort Washington property	$1,722,900.00	$634,610.00	$1,189,750.00		$1,097,900.00	$105,897.85
Yonkers property	228,555.00	118,057.13	21,537.00	$86,076.50	141,051.87	74.20
Miscellaneous	11,900.00	10,650.00	600.00		450.00	32.05
Total	1,963,455.00	763,317.13	1,181,887.00	86,076.50	1,239,401.87	105,704.10

SCHEDULE A, PART V

A statement of all moneys received by said executors on account of income derived from said estate, including all rents from said real property and all interest, dividends, and other income received, except as set forth in Schedule A, Part II.

1918: Various items, aggregating $35.00.
1919: Various items, aggregating $956.86.
1920: Various items, aggregating $81,126.34.
1921: Various items, aggregating $143,032.45.
Total, $225,150.65.

53

SCHEDULE B, PART IV

A statement of all moneys paid from income of said estate for necessary expenses properly chargeable thereto.

1919: Various items, aggregating $278.12.
1920: Various items, aggregating $2,364.56.
1921: Various items, aggregating $40,190.00.
Total, $42,832.68.

SCHEDULE C, PART II

A statement of all moneys paid on account of the annuities given and bequeathed in and by said will, and whether paid from principal or income of said estate, and the amounts withheld therefrom to meet any income tax thereon.

Name, address, and period	Principal	Income	Tax, withheld principal	Tax, withheld income
Edith Sybel Whitehouse, Newport, R. I.:				
1920				
Apr. 9. Payment to May 14, 1919	$17,000.00	$5,000.00		
May 21. " " " 14, 1920	5,000.00			
Nov. 17. " " Nov. 14, 1920		2,500.00		
1921				
May 14. " " May 14, 1921		2,500.00		
Nov. 14. " " Nov. 14, 1921		2,500.00		

SCHEDULE C, PART III

A statement of the assets of said estate which have been permanently set aside to The James Gordon Bennett Memorial Home for New York Journalists Corporation, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges.

On December 30, 1920, the said executors permanently set
54 aside as part of the residuary estate and as the property of The James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors, as security for the payment of taxes, annuities, or any other charges

against the estate under the will and the income therefrom to be used for the payment of the annuities, as far as may be necessary, the following securities, viz:

Summary of assets to set aside as aforesaid

Promissory notes of Frank A. Munsey Co	$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon	450.00
$34,900 U. S. Victory loan bonds, amount invested therein	34,741.24
Balance of cash uninvested	78.76
Total	3,133,260.00

A statement of all real property mentioned in Schedule A, Part I, remaining unsold and of all personal property mentioned in Schedule A, Part III, remaining unsold or undisposed of, and of all other moneys, securities, and other personal property in the hands of the said executors on the 30th day of November, 1921, including the said assets so permanently set aside for The James Gordon Bennett Memorial Home for New York Journalists Corporation as aforesaid, with the appraised value of, the amount secured by, or invested
55 in said personal property, and which said real and personal property constituted the balance of the estate of the said testator held by the said executors under said will on said date.

Recapitulation

REAL PROPERTY

Borough of Bronx, section 12, block 5376, lot 98.	
Yonkers lots unsold:	
Lots 21 and 22, block 15, map A.	
Lots 1–7, block 17, map B.	
Lots 1–11, block 1, map B.	
Yonkers lots sold but sales not closed:	
Balance of purchase price	$56,828.25

PERSONAL PROPERTY

Personal and household effects, appraised value	8,672.95

SECURITIES

Appraised values thereof, amounts invested therein, or due thereon	3,855,975.66

MONEYS

Balance of principal	156,352.36
Balance of income	57,726.76
Total	4,135,461.98
Retained by Title Guarantee & Trust Co.	3,000.00

There was offered in evidence on behalf of taxpayers a letter or notice sent by the Commissioner of Internal Revenue to the estate

of James Gordon Bennett relating to the liability of the estate for the Federal estate tax; objected to as irrelevant, incompetent, and immaterial to any issue in these appeals. Objection sustained, and exception taken and noted.

56 The above and foregoing statement of evidence is approved, settled, and allowed this 21st day of September, A. D., 1928.

JOHN B. MILLIKEN,
Member, United States Board of Tax Appeals.

Approved:

SPOTSWOOD D. BOWERS.

Now, October 4, 1928, the foregoing statement of evidence certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed June 26, 1928.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said United States Circuit Court of Appeals for the First Circuit heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board.
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.
3. Findings of fact, opinion, and decision of the board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of copy of petition for review.
5. The statement of evidence as settled and allowed.

57–58 6. Orders enlarging the time for the preparation of the evidence and for the transmission and delivery of the record.

7. This præcipe.

C. M. CHAREST,
Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing præcipe certified from the record as a true copy.

[SEAL.]

B. M. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Memorandum

Orders of enlargement of time for docketing case to and including October 8, 1928, are here omitted.

A. I. CHARRON, *Clerk.*

59 In United States Circuit Court of Appeals for the First Circuit

No. 2294. October term, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER FOR REVIEW

v.

SYBIL WHITEHOUSE

Appeal from Board of Tax Appeals

Before BINGHAM, ANDERSON, and WILSON, JJ.

Opinion

Filed February 17, 1930

ANDERSON, J.: This is an appeal by the Commissioner of Internal Revenue from an adverse decision of the Board of Tax Appeals in 7 B. T. A. 600. It involves the question whether an annuity of $5,000 bequeathed to Sybil Whitehouse by James Gordon Bennett is taxable to her as income. Bennett, a citizen of New York, died on May 14, 1918, leaving a will, duly probated, by which the appellee and several others were left annuities aggregating over $100,000; the residue of the estate was left to a public charity, The James Gordon Bennett Memorial Home for New York Journalists, to be incorporated "as soon as practicable"; pending such incorporation the income of the estate was left to three friends (also made executors) absolutely; the home was organized in May, 1919, about a year after Bennett's death. By the executors' account on December 30, 1920, they show that they had permanently set aside to the home a residue of
60 personal property of $3,133,260, subject to taxes, annuities, and other charges. This annuity and most of the others were paid from the corpus of the estate, until November 14, 1920; thereafter, this and most of the others from income.

The applicable provisions of the revenue act of 1921 (c. 136, 42 Stat. 227) are as follows:

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property,

whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (c) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer; * * * but

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income * * *.

"SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct. * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except
61 that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The present question is whether this annuity was a gift or bequest under s. 213 (b) (3), supra, or was distributive income taxable under s. 219 (4), supra.

We think the Board of Tax Appeals was right in holding it a bequest within the fair meaning of s. 213 (b) (3), and therefore not taxable as part of the annuitant's income.

In general we observe that the opinion of the Board of Tax Appeals is sound and adequate, both in its reasoning and in its citation and treatment of the pertinent authorities; it leaves little to be added by this court.

The law of New York obviously controls in construing the will. (De Vaughn v. Hutchinson, 165 U. S. 566, 570.)

The corpus of the estate of the testator was charged with the payment of the annuities. No specific fund was set aside in trust for their payment. (Pierrepont v. Edwards, 25 N. Y. 128; Clark v. Clark, 147 N. Y. 639; Peck v. Kinney, 143 Fed. 76, and authorities cited.) In Matter of Toms (84 Misc. Rep. (N. Y.) 312, 147 N. Y. Sup. 550) the court said:

62 "Annuties like the one created by this will are simply bequests of certain specific sums payable periodically. They do not possess any of the elements of a trust. (Redf., Surr. § 737a; Matter of Collins, 144 N. Y. 522, 39 N. E. 629; Reid v. Brown, 54 Misc. Rep. 483, 106 N. Y. Sup. 27.)

"They are therefore not subject to the provisions of law which forbid the alienation by a beneficiary of the benefits of a trust fund."

See also Matter of Gurnee (84 Misc. Rep. (N. Y.) 324, 147 N. Y. Sup. 396, and Matter of Kohler, 193 App. Div. (N. Y.) 8, 20, 183 N. Y. Sup. 550); Remsen on The Preparation and Contest of Wills (s. 2), where it is said:

"An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.

"Annual taxes on principal are deducted from a use or income but not from annuities. An annuity is presumed to be for life, unless otherwise expressed. It may be given to two or more persons with right of survivorship, as to a husband and wife 'during their natural lives.'"

In its legal nature an annuity, such as is here involved, is a legacy payable in installments, generally during the life of the legatee. (Compare 3 C. J. pp. 201, 202.)

Of course in administering an estate, taxes, debts, legacies, including annuities, are paid primarily out of income, if available, then out of personal property, and lastly, from realty. In administering this testator's estate the first year's income went to his executors; consequently the annuities were properly paid from the corpus of the estate. Then the home was organized, but presumably had few occupants, so that income remained available for at least a large part of the annuities. But if the residue set aside for the

home, subject to the annuities, etc., had proved non-income-producing, or if the executors had applied all income received to the use of the home, the corpus of the residue would have had to
63 be charged with the payment of the annuities. It follows that the actual payment of the appellee's annuity from income was merely an incident, probably temporary, of the administration of the estate; it might almost be called an accident.

If material, we assume that all of the annuities were subject to the estate tax; so that to sustain the commissioner's construction would involve double taxation, a result "to be avoided unless required by express words" of a tax act. (United States v. Supple-Biddle Co., 265 U. S. 189, 194.)

We agree with the Board of Tax Appeals that the cases of Irwin v. Gavit (268 U. S. 161) and Heiner v. Beatty (17 Fed. (2d) 743, affirmed 276 U. S. 598) are not in point. The taxpayer in the Gavit case was limited to receipt of part of the income from a trust fund, with remainder over. This was held by a majority of the Supreme Court not a gift or bequest within the meaning of the tax act (s. 213 (b) (3)). But in the instant case we are dealing with a bequest of a sum certain, payable during the life of the legatee, from the corpus of the estate, unless of course income be available for such payment, as pending development of needs of the home there was. How long such income will be thus available is entirely uncertain. It would seem anomalous to tax such annuities as income of the recipient one year and not permanently. Apparently the Government made no attempt to tax them for the two years when actually paid from the corpus of the estate.

In the Beatty case, the testator expressly provided that there be "set apart * * * in trust * * * in separate funds, one for each annuitant, sufficient sums to produce by the clear net interest and income thereof respectively, the several annuities, * * * and to pay the several annuities from the * * * income * * * or to purchase such annuities in life insurance companies." The Supreme Court affirmed, on the authority of Irwin v. Gavit, the decision of the Circuit Court of Appeals for the Government, reversing the holding for the plaintiff in 10 Fed. (2d) 390.

The decision of the Board of Tax Appeals is affirmed.

64 In United States Circuit Court of Appeals

Minute entries

On November 22, 1929, a motion for revival and for substitution of Robert H. Lucas, Commissioner of Internal Revenue, as party respondent, assented to, was filed by the petitioner for review and approved by the court.

On January 14, 1930, this case came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable

George W. Anderson, and Honorable Scott Wilson, circuit judges, sitting.

In United States Circuit Court of Appeals

Final decree

February 17, 1930

This cause came on to be heard January 14, 1930, upon the record upon petition for review of the United States Board of Tax Appeals and was argued by counsel.

Upon consideration whereof it is now, to wit, February 17, 1930, here ordered, adjudged, and decreed as follows: The decision of the Board of Tax Appeals is affirmed.

By the court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on April 18, 1930, mandate issued.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

[Indorsement on cover:] Filed No. 35,042. U. S. Circuit Court of Appeals, First Circuit. Term No. 129. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. Sybil Whitehouse. Petition for writ of certiorari and exhibit thereto. Filed May 17, 1930. File No. 35042.

U. S. GOVERNMENT PRINTING OFFICE: 1930